Date Issued: August 5, 1996

Case No. 95-CAA-12

In the Matter of:

THOMAS JEFFERSON KESTERSON,
Complainant

v.

Y-12 NUCLEAR WEAPONS PLANT, et al.
Respondents

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY DECISION

I. BACKGROUND

This proceeding is brought under the employee protection ("whistleblower") provisions of five federal statutes: the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622; the Solid Waste Disposal Act ("SWDA"), as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6971; the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610; and the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C § 5851 ("the Acts").

The complainant, Thomas Kesterson, was originally hired as an hourly security guard at the K-25 plant in Oak Ridge, Tennessee by Union Carbide Corp.'s Nuclear Division. On August 1, 1984, he became an employee of Respondent Lockheed Martin Energy Systems ("LMES" or "Energy Systems"), formerly Martin Marietta Energy Systems, when LMES took over management of the facilities at Oak Ridge. In 1986, Complainant was promoted to the position of Security Analyst II.

The named respondents are as follows: (1) LMES, which manages the K-25 and Y-12 plants under contract with the U.S. Department of Energy ("DOE"); (2) Lockheed Martin Technologies ("LMT"), formerly Martin Marietta Technologies, the parent corporation of LMES; (3) Lockheed Martin Corporation, formerly Martin Marietta Corporation, corporate owner of LMT; (4) the K-25 plant; (5) the Y-12 plant; (6) the DOE Oak Ridge Operations Office; (7) Peter White, manager of the K-25 Plant Protection and Shift Operations Department); (8) R. Bruce Hunter, Department head for Security Operations; (9) "Pete" Peterson; and (10) O. J. Sheppard.

Complainant filed a complaint with the Wage and Hour Division on November 17, 1994. On April 7, 1995, the District Director found that the complaint was without merit, and that any

adverse actions experienced by the Complainant were not motivated by protected activities. On April 14, 1995, Complainant timely appealed the District Director's determination, and requested a hearing before an Administrative Law Judge. The respondents have filed motions to dismiss and/or for summary decision, which are presently before the court.

DOE argues that the Department of Labor does not have jurisdiction because the complainant has never been a DOE employee; that DOE is not an "employer" under the employee protection provisions of the ERA; that sovereign immunity has not been waived with respect to DOE for purposes of the ERA; and that the complaint fails to specify how DOE's conduct, even if complainant's allegations are taken as true, was retaliatory, and must therefore be dismissed for failure to state a claim upon which relief can be granted. The non-DOE respondents argue that only Energy Systems is complainant's employer and that all the other respondents must be dismissed; that various allegations fail to identify any activity protected by the Acts and must therefore be dismissed or summary decision granted; that most of the claims are barred by the applicable statute of limitations; and that the alleged adverse actions which are timely are unrelated to any protected activity and have a proper business justification. The respondents have supported their motions with sworn affidavits by various employees, and portions of the deposition of the complainant.

Complainant's opposition to the motions essentially recapitulates the allegations of his complaint to Wage-Hour, which are discussed below. Complainant also moves to compel the non-DOE respondents to withdraw the deposition portions cited, or to introduce the entire deposition. Because complainant has failed to indicate why the cited portions of the deposition are irrelevant, or why the other parts of the deposition are relevant, the motion is DENIED. See 29 C.F.R. § 18.23(a)(5).

As attachments to the opposition, complainant includes a declaration by his counsel, Edward A. Slavin, Jr., which asserts that there is not yet sufficient information to allow the court to rule on a summary judgment motion because discovery and FOIA ("Freedom of Information Act") requests are ongoing. The declaration also asserts that attorney Slavin was aware of published reports relating to an investigation of Martin Marietta Energy Systems for illegal dumping of radioactive waste in Alabama, that management was nervous about the investigation, and that Peter White and other managers must have known about these investigations when they ordered the complainant to go to the Anderson County, Tennessee Courthouse. Complainant has also included an unsigned statement by Peter White to a Wage-Hour investigation form dated March 1, 1995, which discusses some of the allegations of the complaint, and a newspaper article in the News Sentinel dated November 4, 1995, about a controversy between DOE and an environmental group relating to blending bomb-grade uranium to reduce its potential for weapons use.

II. ALLEGATIONS OF THE COMPLAINT

The complainant alleges that a hostile working environment has existed since 1991, when he filed internal complaints about R. Bruce Hunter for being abusive in a meeting; and that

Respondent LMES and several of its employees targeted him for abuse commencing in 1992 as a result of protected activities under the ERA and other whistleblower statutes. It is alleged that complainant received good performance evaluations and numerous commendations during the course of his career. (Complaint pars. 13-15). In December, 1990, however, complainant refused to cooperate with a request by Peter White, manager of the K-25 Plant Protection and Shift Operations Department (PP&SO) to "get rid of ... company-worker Nita Holley before Bruce Hunter arrives." (Complaint pars. 17-19.) White allegedly then began retaliating against complainant. Complainant states that this retaliation occurred because complainant "refus[ed] to help an MMES manager perpetrate a campaign of employment discrimination in violation of Title VII of the Civil Rights Act." (Complaint par. 20).

Complainant further alleges that, on July 22, 1991, when he conducted a briefing for R. Bruce Hunter, the new department head for Security Operations, about the security locking system for K-25, Hunter launched into a tirade which included an anti-Semitic remark. (Complaint pars. 22-25). Complainant then complained to division manager C.H. ("Pete") Peterson. Complainant alleges this is "protected activity under the ERA and DOE orders because the emotionalism and abusiveness demonstrated could raise questions about Mr. Hunter's fitness for duty and fitness to hold a security clearance under provisions of 10 CFR §§ 710.11(h) & (1)('mental illness' or 'notoriously disgraceful conduct.')" He also filed an internal EEO complaint with a Mr. Spence Echols but did not pursue it with the plant wide EEO Office. (Complaint pars. 26,27).

The complaint goes on to allege that complainant then was requested to identify and list certain surveillance equipment and to turn it over to Security Officer Bob Finch, and that false accusations were solicited against him that could result in criminal prosecution and loss of his Q clearance. He was directed to turn over the keys to the storage room in office, and was told that if missing equipment did not turn up, he would be required to take a lie detector test. After complainant explained that he had removed a tape recorder and used it with hostage negotiation equipment, he then returned the tape recorder but was accused by respondents White and Hunter of returning one which was different from the missing one. He was also accused of falsifying classified documents and was ostracized. When headquarters officials interviewed him about the equipment, he told them the purchases were approved. No further actions were taken. He was also accused of falsifying his time cards. These actions caused him emotional distress and deterioration of his health. Nevertheless, he was given a positive performance appraisal for the 1990-1991 fiscal year on January 23, 1992. (Complaint pars. 34-48).

The complaint further alleges that complainant was directed to assist in the investigation and criminal prosecution for rape, sexual molestation of children, and child pornography of a former LMES employee, John Burrell, by accompanying a detective to the HAZWRAP Office in Oliver Springs, Tennessee, facility while the detective searched Burrell's office. The detective told him that Burrell might have LMES computer software on computer disks. Complainant passed this on to White, who then ordered him to go to the courthouse with a technician to erase the company software. Complainant balked at doing so without checking with the legal department, on the grounds that such a deletion would constitute obstruction of

justice. Nevertheless, he did so and this deletion of evidence then allegedly became front page news, "permanently tarnishing Mr. Kesterson's image in the eyes of local law enforcement personnel." An investigation ensued, where he states he answered honestly. He alleges that his resisting White's orders, urging him to get legal advice, and his responses to questions asked during the investigation are protected activity under the Energy Reorganization Act, and that White became upset with him and subsequently mocked him, and his health deteriorated. (Complaint pars. 50-90).

Complainant was transferred from the K-25 to the Y-12 Nuclear Weapons Plant on or about December 1, 1993. He asserts that the disappearance of handwritten notes regarding his treatment at work during the move was calculated to prejudice his rights, and that, after his transfer to Y-12, respondent Sheppard accused complainant of taking too much time off from work while out on a workers' compensation-covered injury. (Complaint pars. 91-94).

On March 29, 1994, complainant received an E-mail message from Hunter which asked him to touch base with all the smokers in the group and organize a "police call" the next day because "there are too many cigarette butts on the ground and the cigarette gizmo needs to dumped. The situation makes us all look like we don't care and makes the place look more trashy than it needs to be." Complainant found this humiliating, and it was not in his job description. (Complaint pars. 95-104 att. 1).

On March 30, 1994, respondent Shepherd showed complainant an E-mail message from Hunter about security clearance reductions, stating that, although he can legitimately argue why each person in Physical Security requires a Q clearance, if pressed, he would suggest downgrading complainant to an L clearance; complainant could still be effective since he primarily handles investigations and might, at worst, require an escort to enter a Q-cleared only area. On April 16, 1994, complainant's clearance was reduced from a Q to an L. He was one of thirteen persons from Protective Services who were so reduced, "to ensure adherence to the Energy Systems commitment to the DOE that clearances will be maintained only when essential and even then at the lowest level required." Complainant alleges that this downgrading was retaliation and intimidation for protected activity. He also alleges that, later that year, he was told to "look" for a job elsewhere in LMES. (Complaint pars. 99, 105-112, atts. 3,4).

On August 2, 1994, a Mr. Harry Williams filed a whistleblower complaint. Complainant was subsequently interviewed by LMES attorneys, and allegedly confirmed Williams' allegations. It is alleged that LMES security managers learned about the statement and retaliated. (Complaint pars. 113-116). It is alleged that complainant was threatened with transfer to another boss, Lorry Roth, who is abusive. (Complaint pars. 113-119).

On November 7, 1994, respondent Sheppard contacted complainant, who was at home due to pain in a ruptured disk in his back, and asked him to come to work. This is alleged to constitute intimidation and harassment. (Complaint par 120).
In a meeting on November 11, 1994, respondent Hunter asked for information about his medication, injuries and treatment. Complainant suggested that he contact the Y-12 medical

department or his workers' compensation attorney, Mr. Roger L. Ridenour of Clinton, Tennessee. Respondent Sheppard stated that, if complainant is unable to climb, stand or walk, he would ask Hunter to replace him. Complainant's workers' compensation attorney then telephoned Mr. Robert M. Stivers, Jr., of the Energy Systems Legal Office, who agreed to check into the situation. Sheppard then told complainant that if the medical department continued his restrictions, he was going to send a written request to Hunter to replace him immediately.

Later that same day, Dr. Roberts of the Y-12 medical office changed complainant's existing medical restriction, which had been in place since November, 1993, from a 35- to 25-pound weight lifting limit and prescribed no standing, walking and sitting for prolonged periods. When complainant gave a copy of the newly revised restriction to Sheppard, Sheppard again stated that he was going to send a written request to Hunter to replace him. On November 15, 1994, Hunter met with complainant, discussed his workers' compensation claim, asked him what he could do, and suggested that he needed to find another job. Hunter allegedly pushed complainant to perform a survey with regard to precious metals which allegedly involved "a great deal of climbing, standing and walking." Complainant told him about a comment by respondent Sheppard that "I can kick you in your ass to straighten your back out." Complainant alleges that "[t]here was no discussion of reasonable accommodation of complainant's disability," and that, "to retaliate against protected activity, the respondents have repeatedly pestered him to find other work outside of the LMES security department." (Complaint pars. 121-140).

On November 17, 1994, Hunter asked complainant to attend a meeting with Labor Relations personnel on Friday, November 18, 1994. Complainant stated that he had vacation plans, and that, if the meeting was mandatory, he wished to bring a lawyer. Hunter also stated that there would be a meeting on November 21, 1994 with Dr. Roberts to discuss his medical problem. Complainant states that this was another act of intimidation and harassment. (Complaint pars. 142-147).

The complaint then goes on to set forth various allegations about another case, the Varnadore case, general descriptions of Martin Marietta's management structure which is allegedly "highly complex and much like in the military," and its purported pattern and practice of discrimination against whistleblowers, discussions about the Anderson County District Attorney General James Nelson, and descriptions of Oak Ridge Tennessee as a "company town." These allegations do not include any additional information about Mr. Kesterson. (Complaint pars. 154-177).

Extensive relief is requested against the non-DOE respondents, including an investigation by Wage Hour, reinstatement of complainant's Q clearance, transfer to Oak Ridge National Laboratory (ORNL), compensatory and punitive damages, back pay and a promotion to an ORNL security management position or front pay, accommodation to complainant's high blood pressure and back condition by means of, inter alia, an automobile and exercise equipment, public apologies by respondents White, Hunter, Sheppard, Peterson and by Norman Augustine,

Chairman of the Board of Martin Marietta and Joe LaGrone, manager of Oak Ridge Operations, including videotapes of the apologies. As relief against DOE, complainant requests compensatory and exemplary damages, attorney fees and expenses, and various types of injunctive relief, including orders to inform DOE ORO, contractor and subcontractor employees of their rights under whistleblower statutes, and to post notices of coverage of Department of Labor environmental and energy whistleblower laws. Finally, complainant requests an order for DOE and DOE ORO to divest various environmental, industrial hygiene, safety and security functions from Martin Marietta and its subsidiaries and to "enter into contracts with fiercely independent providers of such services lacking any organizational, personal or financial motivation for providing inaccurate data and untrue or misleading assurances about employee health in the face of radiation and toxic substances." (Complaint pars. 178-186).

III. DISCUSSION

In C.D. Varnadore v. Martin Marietta Energy Systems, DOE, 95-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1 (ARB June 14, 1996)(Varnadore), the Administrative Review Board ("ARB") of the Department of Labor considered many of the same issues raised here. That matter involved three consolidated cases brought under the Acts by an individual whistleblower complainant represented by the same counsel of record here against many of the same parties. Various individuals were also included as respondents. A hostile work environment was also alleged. Similar sweeping relief was requested. (See Varnadore, slip op. at 10-12).

The standards governing motions for summary decision and for failure to state a claim on which relief can be granted in environmental whistleblower cases are set forth at Varnadore, slip op., pp. 15-16. Such motions are governed by 29 C.F.R. §§ 18.40 and 18.41. The ARB applies the standards set forth by the United States Supreme Court in the cases of Anderson v. Liberty Lobby, 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) to motions for summary decision. A party opposing such a motion is not permitted to rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue of fact for the hearing. To defeat a properly supported motion for summary decision, the non-moving party must present affirmative evidence. If the non-movant fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary decision.

The burdens of proof in environmental whistleblower cases are as follows. Complainants must prove, by a preponderance of the evidence, that they were retaliated against for engaging in protected activity. Such a showing requires proof that they engaged in protected activity; the employer knew about it; and the employer then took adverse action against them, which was motivated at least in part by the employee's protected activity. In dual motive cases, once the complainant has proven by a preponderance of the evidence that unlawful motive played a part in the employer's decision to take adverse action, the employer then has the burden of proving

that it would have taken adverse action for legitimate reasons in any event. (Varnadore, slip op. at 31-32).

The standards for dismissal for failure to state a claim upon which relief can be granted are as follows. The facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. A dismissal is purely on the legal sufficiency of the complainant's case. Even if the complainant proved all of its allegations, [s]he could not prevail. In other words, even if the facts alleged are taken as true, no claim has been stated which would entitle the complainant to relief. (Varnadore, slip op. at 58-59).

Applying these standards, as discussed below, I find that the claims must be dismissed for multiple reasons, including untimeliness, sovereign immunity, improper parties, lack of subject matter jurisdiction, failure to state a claim on which relief can be granted, and/or failure to raise a genuine issue of material fact for a hearing under the cited statutes.

A. Parties

In Varnadore, the ARB dismissed the Department of Energy as a party because the United States has not waived DOE's sovereign immunity under the ERA, the complainant was not DOE's employee, and the complainant failed to articulate how DOE's actions had an adverse affect upon the terms, conditions, or privileges of his employment with Energy Systems. Slip op. at 55-60. DOE must be dismissed here on the same grounds. See also Teles v. U.S. Department of Energy, No. 94-ERA-22 (Sec'y August 7, 1995). The Secretary has also ruled that, with the exception of whistleblower complaints involving lead-based paint, Congress has not waived sovereign immunity for purposes of the TSCA employee protection provision. Stephenson v. NASA, 94-TSC-5 (Sec'y July 3, 1995). The claims here do not implicate safety concerns involving lead-based paint.

The complaint fails to state a claim against DOE because it fails even to allege that DOE is the complainant's employer or that he is an employee of DOE. As the ARB points out in Varnadore, an employment relationship between the complainant and respondent is an essential element of any claim brought under the Acts. (Slip op. at 57-61). The Department of Labor's jurisdiction under the Acts extends only to "employers" and "employees." In Reid v. Martin Marietta Energy Systems, Methodist Medical Center of Oak Ridge, Tennessee, Medical Management, et Administrative Law Judge., No. 93-CAA-4 (Sec'y April 3, 1995), the Secretary applied the United States Supreme Court's test for an employment relationship as articulated in Nationwide Insurance Company v. Darden, 112 S. Court. 1334 (1992) to a complainant in a whistleblower case, and found that dismissal was proper. That test requires an analysis of

> the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired

> party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

According to the sworn affidavit of Lois J. Jago, Chief of the Personnel and Management Analysis Branch of DOE, Oak Ridge Operations ("ORO") in Oak Ridge, Tennessee, (attachment to DOE Br. I), complainant has never been a federal employee. He is employed, managed and supervised by Energy Systems, which contracts with DOE. Although complainant works in a DOE facility, DOE does not manage, supervise, or control the manner or means by which he performs or accomplishes his duties; DOE has no authority to instruct complainant when or how long he must work; DOE did not hire and has no authority to fire him; no DOE employee supervises or manages his work or evaluates his work performance; Energy Systems pays him for work performed, withholds taxes, and provides employee benefits.

Because the complainant has not countered with affidavits or documentary evidence, the Jago affidavit is unrebutted. Discovery is unnecessary for complainant to counter the Jago affidavit because necessary facts to do so are within complainant's own personal knowledge and could have been supplied by his own sworn affidavit. Even assuming that complainant had alleged that he was a DOE employee, DOE's affidavit establishes that it is not the complainant's employer. Since complainant has failed to present affirmative evidence to the contrary, no genuine issue of material fact as to complainant's status as an employee of DOE has been presented for hearing and summary decision is appropriate. Finally, the complaint fails to state a claim because it fails to articulate any manner in which any DOE actions have had an adverse affect upon the terms, conditions, or privileges of complainant's employment with Energy Systems or even to claim that anyone at DOE has shown any retaliatory animus toward the complainant. Accordingly, the complaint against DOE is hereby DISMISSED.

In Varnadore, the ARB also dismissed as improper parties various individuals on the grounds that, inter alia, the complainant had failed to allege that they were his employer. The four individuals included as respondents here are Peter White, manager of the K-25 Plant Protection and Shift Operations Department, R. Bruce Hunter, Department head for Security Operations; "Pete" Peterson; and O.J. Sheppard. The complainant has failed to allege anywhere in his complaint that any of them were his "employers" within the meaning of the Acts or that he was the "employee" of any of these individuals. He has failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with these individuals rather than a mere supervisory relationship. Accordingly, the claims against these individuals are hereby DISMISSED.

The same infirmity also applies to the two nuclear plants listed as respondents, the Y-12 and K-25 plants. Nowhere does the complaint allege that the plants are employers, or that the complainant is their employee. The complainant has failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with the plants. Accordingly, they are hereby DISMISSED as parties.

In Varnadore, the ARB also dismissed as parties Respondents Lockheed Martin and Lockheed Martin Technologies, because they were not alleged to have employed the complainant, and were merely parent companies of Energy Systems. The same is true in this case; there is no allegation that these respondents employed the complainant and there is no indication that they are anything but parent companies of Energy Systems. Accordingly, Lockheed Martin and Lockheed Martin Technologies are hereby DISMISSED as parties.

LMES does not dispute that it is complainant's employer. (Non-DOE respondents' brief in support of motion for summary decision ("non-DOE Br.") at p. 7.) Accordingly, I find that, as complainant's employer, LMES is the only properly named party respondent in this complaint.

B. Adverse Actions

The ERA has a limitations period of 180 days. The other Acts have limitations periods of 30 days. The complaint was filed on November 17, 1994. Under the ERA, any alleged adverse actions or reprisals that occurred before May 21, 1994 are time barred. Under the other Acts, any alleged adverse actions or reprisals that occurred before October 18, 1994, are time barred.

I find that the following alleged adverse actions occurred before the limitations periods of all the Acts:

(1) Peter White's 1990 accusation that complainant was not a team player and his criticism of complainant's work performance in connection with his refusal to help get rid of Nita Holley. (Complaint pars. 20-21).

(2) R. Bruce Hunter's outburst involving complainant at the July 1991 meeting. (Complaint pars. 22-30).

(3) Hunter's attempt to force complainant to see a physician in July 1991. (Complaint pars. 32-33).

(4) Questioning and accusations by Plant Manager Lincoln Hall, Peter White, R. Bruce Hunter, Pete Peterson, Jim Nations and DOE headquarters officials in connection with missing surveillance equipment in mid 1991. (Complaint pars. 34-46).

(5) An accusation by White and Hunter in 1991 that he had falsified classified documents. (Complaint par 43).

(6) An accusation in 1991 that he had falsified his time cards. (Complaint par 47).

(7) Retaliation in 1992 for his involvement in the destruction of records in evidence in a criminal case at Anderson County courthouse. (Complaint pars. 50-90).

(8) December 1993 relocation to the Y-12 plant and destruction of handwritten notes. (Complaint pars. 91-94).

(9) The March 1994 memorandum from Hunter ordering a cleanup of cigarette butts. (Complaint pars. 95-104).

(10) April 1994 security clearance reduction and suggestion to look for another job at Energy Systems. (Complaint pars. 105-112).

I find that the following alleged adverse actions occurred after May 21, 1994, within 180 days prior to the filing of the complainant on November 17, after the interview with Energy Systems attorneys about the Harry Williams complaint.

(1) Threatened transfer to Lorry Ruth. (Complaint par. 119).

(2) Telephone call by O.J. Sheppard at home on November 7, 1994. (Complaint par. 120).

(3) Meetings on November 11 and 15, 1994, with Hunter and Sheppard about complainant's ability to perform his job functions. (Complaint pars. 121-147).

(4) November 17, 1994 request by Hunter to attend meetings on November 18 and 21, 1994 with Labor Relations and Medical Personnel.

Complainant seeks to avoid the timeliness problems obvious in this case by claiming that all of the adverse actions alleged since 1990 are part of a hostile work environment and that the violation is therefore a continuing one. To establish a continuing violation, complainant must prove that these alleged adverse actions are somehow connected, rather than a set of isolated decisions involving disparate facts, and that at least one of them occurred within the limitations period. It is not sufficient to show simply that the actions all affected his working conditions. Bonanno v. Northeast Nuclear Energy Company, 92-ERA-40, 41 (Sec'y August 25, 1993); Gillilan v. TVA, 92-ERA-46, 50 (Sec'y April 20, 1995). As the Secretary has also noted in an earlier decision in one of the Varnadore cases, hostile work environment and continuing violation claims have similar requirements of frequency or pervasiveness. Isolated or single incidents of harassment are insufficient to constitute a hostile environment. C.D. Varnadore v. Oak Ridge National Laboratory and Lockheed Martin Energy Systems, Inc., Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1 (Sec'y January 26, 1996), slip op. at 78-79.

Other than their effect on complainant's working conditions, there is no commonality to the events since 1990. They are discrete and isolated. They are, on their face, miscellaneous incidents that occurred at intervals over a four-year period involving different job assignments, terms and conditions of complainant's employment, and his ability, in the face of an admittedly serious medical condition, to continue to perform his job duties. Notwithstanding the 1990-1991 incidents, complainant admittedly received a "glowing" annual performance review on January

23, 1992, for the period 1990-1991 (complaint par. 48), thus reinforcing the isolated and unconnected nature of these events. Accordingly, I conclude that the only timely and therefore potentially viable allegations of retaliation are the threatened transfer to Lorry Ruth and the November 1994 events with respect to complainant's physical condition and worker's compensation claim.

With respect to the Lorry Ruth matter, according to complainant's own deposition testimony, neither Sheppard nor Hunter threatened to transfer him to work for Ruth or anyone else or indicated in any way that he was compelled to apply for a job with Ruth. (Dep. pp. 284-287, 293). On the contrary, Sheppard informed complainant of the job opening after he told Sheppard that he was going to try to move out of the Security Department. (Dep. p. 290). Complainant testified that he was merely advised of a job opening with Ruth and that, after speaking with Ruth and other employees about the job, decided that he did not want the job. (Dep. pp. 284-285).

For an employer's action to constitute an "adverse action" within the meaning of the Acts, some "tangible job detriment" must occur, i.e. something adverse affecting a complainant's compensation, terms, conditions or privileges of employment. Varnadore, Slip op. at 20. See also Deford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Smith v. Tennessee Valley Authority, 90-ERA-12 (Sec'y April 30, 1992), 6 Department of Labor Decisions #2, pp. 231,232. A supervisor's discussion of possible job openings elsewhere with a subordinate after the subordinate mentions his interest in such openings does not constitute a tangible job detriment. Accordingly, I find no genuine issue of material fact for hearing.

With respect to the November 1994 events, the complaint includes allegations that complainant was threatened with replacement if he was physically incapable of performing his job functions. (Complaint pars. 121, 129, 130, 138). Construing these allegations in the light most favorable to the non-moving party, I find that they state a claim of adverse action because loss of an employee's job is clearly a tangible job detriment. As discussed below, however, I find that they must be dismissed because there is no genuine issue of fact that they were motivated by discriminatory animus prohibited under the Acts.

C. Protected activity

A protected activity is an essential element of the complainant's case. An employee's complaint must be "grounded in conditions constituting reasonably perceived violations" of the Acts. See Tyndall v. United States Environmental Protection Agency, Nos. 93-CAA-6; 95-CAA-5 (ARB June 14, 1996), slip op. at 4.

As discussed below, the allegations which do not involve protected activity are: (1) that complainant was asked and refused to help get rid of Nita Holley in December 1990; (2) that he complained to Pete Peterson regarding Bruce Hunter's behavior during a meeting on July 22, 1991; (3) that he complained to EEO division officer Spence Echols regarding Bruce Hunter's behavior at the July 22, 1991, meeting; (4) that he participated in a search for missing

surveillance equipment in 1991; (5) that he allegedly resisted Peter White's orders to destroy computer software evidence at the Anderson County courthouse in 1992; and (6) that he had a problem with absenteeism in 1994.

Even assuming that Peter White in fact retaliated against complainant in the Nita Holley matter, the complaint admits at paragraph 20 that any such retaliation was motivated not by environmental and safety concerns, but by complainant's opposition to employment discrimination alleged to be in violation of Title VII of the Civil Rights Act. (42 U.S.C. §2000e-2). Title VII prohibits employment discrimination on the basis of race, religion, color, sex and/or national origin. Such discrimination is not a violation of these Acts nor could it be reasonably perceived as a violation.

With respect to his complaint to Peterson about R. Bruce Hunter's allegedly abusive and anti-Semitic comments in a 1991 meeting, complainant has admitted in his deposition that he was concerned about his job situation, not about Hunter's fitness for duty or to hold a security clearance. He admits that he said nothing about any need to remove Hunter from his position because of emotional instability. He admits that he was unable to make a judgment about Hunter's emotional stability or mental capability on the basis of these comments. (Dep. pp. 55-58). Ordinary employment disputes between supervisors and supervisees, as this was, are not protected activity under the Acts. See Deveraux v. Wyoming Association of Rural Water, 93-ERA-18 (Sec'y October 1, 1993), slip op. at 5-6. His EEO complaint to Spence Echols, like his complaint in the Nita Holley matter, at best implicates opposition to employment discrimination on the basis of religion under Title VII, which is not a violation of these Acts nor reasonably perceived as such.

Complainant argues that his truthful answers during the investigation and search for missing surveillance equipment were protected activity because whistleblowers often face some type of surveillance and his truthful answers may halt future lawbreaking. (Complainant's br. at 21-22). This argument is mere speculation. A security department for a nuclear plant could well be expected to maintain surveillance equipment for its legitimate business. The fact that the security department had surveillance equipment, and that some of it was missing, is, in and of itself, entirely unremarkable. Complainant has made no affirmative showing that these events had anything to do with unlawful surveillance of whistleblowers or that he had any concern about such surveillance.

Counsel's declaration describing his personal knowledge of an investigation of illegal dumping of radioactive waste in Alabama by respondent LMES and its chairman, Clyde Hopkins, is apparently intended to tie complainant's allegations about his role in deleting computer records in a criminal case at the Anderson County, Tennessee, courthouse to a protected activity. It fails to do so. These allegations, even if taken as true, fail to articulate any connection with any activity protected under the Acts, or to raise a material issue for hearing that a protected activity was somehow involved in these events.

The allegations about complainant's medical problems and absences in November 1994, and his supervisors' reactions, fail to articulate any connection to any activity protected by the Acts. Complainant had a workers' compensation claim related to his medical problems. Filing a workers' compensation claim or utilizing workers' compensation benefits may be protected activity under applicable workers' compensation statutes, but it is not a protected activity under these Acts. Likewise, opposition to the failure to accommodate a disability, assuming that claimant had a disability arising from his medical problems, may be protected activity under applicable statutes banning disability discrimination in employment, but it is not a protected activity under these Acts. Finally, complainant has cited no authority to show that absenteeism is a protected activity under these Acts.

I find that the only allegations of the complaint which state a claim of protected activity are paragraphs 113-116 relating to complainant's interview with the Energy Systems' attorneys investigating Harry Williams' August 2, 1994 whistleblower complaint to Department of Labor. Construing these allegations in the light most favorable to the non-moving party, complainant was about to give a statement to the Wage-Hour investigator in regard to Williams' whistleblower complaint brought under the same authorities relied on here, and to testify at the hearing in his case. Protected activity under the Acts expressly includes "testify[ing or being] about to testify in any ... proceeding [under one of the Federal statutes listed in 29 C.F.R. § 24.1]; or ... assist[ing] or participat[ing] or [being] about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute." 29 C.F.R. § 24.2(b)(2), (3).

D. Motivation to Discriminate

As discussed, an essential element of complainant's case, and one on which he bears the burden of proof, is a showing that any adverse action against him was motivated, at least in part, by his protected activity. Accordingly, complainant would have to prove at hearing that the November 1994 activities of his supervisors Hunter and Sheppard with respect to his workers' compensation injury were motivated at least in part by his interview with Energy Systems' lawyers regarding Harry William's whistleblower complaint, and his intent to give a statement to the Wage-Hour investigator and to testify at the hearing in his case. Complainant would also have to prove that those supervisors were aware of these matters.

O.J. Sheppard's affidavit of October 9, 1995, states the following with respect to the Williams' matter and his November 1994 contacts with complainant. Because it was standard operating procedure for complainant to advise Sheppard of his whereabouts, in view of Sheppard's responsibilities for making his assignments, setting priorities, and suggesting methodologies, complainant told him that he was going to see the Energy Systems attorneys about Harry Williams. Sheppard states that the name meant nothing to him; he had never heard the name, had never met the man, and did not recognize the name as someone involved in any of their investigations. He states that he did not mention complainant's visit to the Energy Systems attorneys to anyone else, including Bruce Hunter. Complainant's deposition confirms that the only subjects he discussed with Sheppard in this regard were that he had to have an interview

with the Energy Systems Legal Department about Williams' complaint and that, during the interview, he had discussed some documents. (Dep. pp. 264-265).

Sheppard further states that a meeting had been scheduled on Monday, November 7, 1994, with the DOE Oak Ridge Safeguards and Security Survey Team, to discuss and answer questions about a precious metals crime prevention survey complainant was assigned to perform at the Oak Ridge National Laboratory. Since complainant had worked on the survey alone, he was in the best position to answer any questions from DOE. After complainant called on November 7 and told Gina Brown that he would not be coming to work that day, Sheppard called him at home to find out how he was and to ask if he would come in the afternoon for the meeting if he felt better. Complainant said "no." Sheppard denies badgering, harassing or intimidating complainant about coming in or not coming in. After complainant returned from sick leave, Sheppard asked him on November 11, 1994 about the extent of his back problem, what he was able to do, and whether he was on medication, so that Sheppard could make appropriate assignments, share projects or get someone else to help him, and could determine if complainant could drive or perform other duties that medication-related drowsiness might preclude.

Complainant's deposition confirms Sheppard's affidavit with respect to the November 7, 1994 meeting. Complainant had been working alone on the precious metals survey and would have been the best person to answer any DOE questions, the meeting for November 7, 1994 had been previously scheduled and complainant was aware of it, Sheppard called him only to see if he could come in to the office just for the meeting, and, after complainant refused to do so, Sheppard said little else and hung up. (Dep. pp. 296-298).

In his affidavit of October 2, 1995, R. Bruce Hunter, O. J. Sheppard's supervisor and head of the Physical Security Department in the LMES protective services organization, states that he did not know that complainant had even been interviewed in connection with Williams' Department of Labor whistleblower complaint until he read the complaint in this matter.

He also states that his contacts with complainant on November 11, 15 and 17, 1994 were related to complainant's limping and absence on Monday through Wednesday, November 7, 8 and 9; that a meeting had been scheduled for complainant during that period to discuss the survey on precious metals with the DOE Oak Ridge Safeguards and Security Survey Team; that, upon complainant's return after November 9, he asked complainant's immediate supervisor, O.J. Sheppard, to find out the extent of complainant's back problems and whether he was on medication to see what to expect from him and whether he could or should drive a vehicle; and that Sheppard advised that, when he asked complainant about these matters, complainant said that it was none of his business and if he wanted answers, he should call complainant's worker's compensation lawyer. Hunter then had a meeting in his office with complainant, Sheppard, and Greg Herdes, another member of the department, who was asked to act as an observer. Complainant stated that he was not going to answer any questions about his physical condition and if he was on medication. He stated that, if Hunter wanted to know anything, he had to talk

to his worker's compensation lawyer. Herdes' affidavit of October 2, 1995 confirms Hunter's description of this meeting.

Hunter further states that Energy Systems attorney Bob Stivers then informed him that he thought complainant was going to file a workers' compensation lawsuit against the company, and had received a telephone call from complainant's worker's compensation lawyer accusing Hunter of harassment. Hunter then went to the medical office, and, after advising of complainant's apparent lawsuit and refusal to discuss his medical condition ("I had absolutely no idea where Kesterson was coming from"), was told that complainant's case would be referred to a medical review board.

On November 14, 1996, he told O.J. Sheppard to tell complainant to complete his precious metals survey, write his report, and be prepared to give a briefing on the results of the survey by December 1, 1994. Complainant then told Sheppard that he refused to prepare or give a briefing, and that briefings were not part of his job description. On November 15, Hunter had a one-on-one discussion with complainant in his Office. Complainant stated that he expected Hunter to stop harassing him, to stop trying to find out what was wrong with him, and that he did not like Hunter. He stated that he was unable to perform the survey work because it required too much walking and standing and he could not negotiate stairs. Hunter offered to give him a government car, let him take as many breaks as he needed, sit down during meetings with the precious metal custodians, complete only those areas above ground floors that were serviced by elevators, and complete the survey later than the December 1, 1994 deadline if necessary. Nevertheless, complainant still refused to do the work.

On November 16, 1994, Hunter met with Dr. Brown in the medical department about complainant's accusation of harassment and his new physical limitations profile. Dr. Brown stated that complainant had said he would try to complete the precious metal survey. Hunter told him that complainant had refused to do so. Brown then suggested that Hunter bring complainant in to discuss the profile with Stan Roberts, the physician's assistant in the medical department, and that he would refer the case to the medical review board.

On Thursday, November 17, 1994, Hunter contacted Joyce Conner in the Y-12 Ethics Office about his problems with complainant, and she stated that she would try to set up a meeting with Charlie Minor and complainant and would get back to him. When complainant asked to take a vacation day on Friday, November 18, 1994, Hunter permitted complainant to do so despite the lack of lead time on the request, but pressed him for answers to his questions about what he could and could not do on the job in light of his back problems and physical limitations profile, and whether he could finish the survey; if not, why not; and, if so, an anticipated completion date. Complainant said only that he would try to complete the survey, but if it bothered him he would stop because he did not wish to further injure his back. He also refused to meet with Joyce Conner and Charlie Minor without his worker's compensation lawyer. Hunter then told him that, since complainant was refusing to discuss whatever was causing his insubordination, the problem between Sheppard, Hunter, and complainant would have to be moved "into Human Resources channels." Complainant was getting very angry, and the meeting then concluded.

Complainant has failed to file any additional affirmative evidence with respect to these events or to refute the Sheppard and Hunter affidavits in any way. These affidavits are fully consistent with complainant's deposition and complaint. Complainant himself testified that Sheppard and Hunter wanted to find out about his workers' compensation accident and what he could or could not do. (Dep. pp. 307-308). Significantly, when he felt he was being harassed in this regard, he told his supervisors to talk to his workers' compensation attorney, not to his whistleblower attorney. He also specifically alleges at Paragraph 141 of his complaint that the November 15, 1994 meeting with Hunter, which was part of the chain of alleged retaliatory events during that period, "was harassment and intimidation resulting from your Complainant's retaining the services of attorney Roger L. Ridenour to represent Mr. Kesterson in his worker's compensation action." Since complainant himself attributes any retaliatory events to his filing of his worker's compensation action, rather than any protected whistleblower activity, the court has no reason to supply another motivation.

Finally, there is no indication in the record that Hunter even knew that complainant had an interview with the LMES attorneys about the Harry Williams' complaint, or that he was about to have additional involvement in Williams' complaint. No affirmative evidence has been presented to suggest that the actions of Sheppard, who did know about the interview, were in any way related to it. The Sheppard and Hunter affidavits demonstrate that their actions during November 1994 were motivated not by animus based on a protected activity under the Act, but by their legitimate concern, as his supervisors, over his injury, absences, and ability to continue to perform his job functions.

In his reply brief, complainant alleges that the court "must look these witnesses in the eye to gauge their credibility" (p. 37). That is insufficient. Complainant is not permitted to rest upon mere allegations or denials of his pleading. Varnadore, slip op. at 15. Any affidavit can be attacked on the grounds that it does not allow the trier of fact to confirm a witness' credibility by looking at the witness. Summary judgment could never be granted on this premise. Where, as here, no affirmative evidence has been presented that would call into question these affiants' credibility on these events, there is no issue of credibility for a hearing. Accordingly, summary decision is hereby granted under the Acts on the November 1994 allegations of retaliation.

RECOMMENDED ORDER

The respondents' motions are hereby GRANTED, and the case is DISMISSED.

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EDITH BARNETT
Administrative Law Judge

Washington, D.C.
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NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Regulation. 19978 and 19982(1996).